ATTORNEY FOR APPELLANT:

DARREN BEDWELL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

PHILLIP D. MAGNESS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0606-CR-246
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William Sleva, Judge
Cause Nos. 47D02-0403-FD-241; 47D01-0403-FB-256; 47D02-0403-FC-300

July 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Phillip D. Magness appeals the sentences imposed following his convictions for Possession of Marijuana,[1] a class D felony, Robbery,[2] a class C felony,[3] and two counts of Burglary,[4] a class C felony. Specifically, Magness argues that the trial court improperly identified a purported "multi-county crime spree" as an aggravating factor because this circumstance violated the rule announced in Blakely v. Washington, 542 U.S. 296 (2004), inasmuch as it was not found by a jury. Magness also contends that the trial erroneously determined that the "violent" and "major" crimes constituted an aggravating factor. Appellant's Br. p. 14. Additionally, Magness asserts that the trial court was without authority to impose enhanced sentences and also order them to be served consecutively to one another. Finally, Magness claims that the sentences were inappropriate in light of his character and the nature of the offenses. Finding no error, we affirm the judgment of the trial court.

FACTS

On March 27, 2004, Magness and two other individuals burglarized the Mini Mart in Avoca. The trio took approximately $75 in coins, and with several items of merchandise. That same day, Magness and the others burglarized Rob's Auto Repair in Springville, where they stole cigarettes and merchandise. Magness admitted that he was under the influence of Xanax and cocaine when he committed these offenses.

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[1] Ind. Code § 35-48-4-11.

[2] Ind. Code § 35-42-5-1.

[3] The State originally charged this offense as a class B felony.

The following day, Magness was arrested for possession of more than thirty grams of marijuana. Thereafter, on April 2, 2004, Magness and another individual went to Swifty's Gas Station near Bedford. They threatened the attendant with pellet guns and took $300 to $500 from him.

On December 19, 2005, Magness pleaded guilty as charged to all four offenses with no written plea agreement. At the sentencing hearing that was conducted on May 15, 2006, the trial court commented about the instant charges as well as Magness's recent convictions from other counties:

> The problem is, and you know this, . . . that you go on this incredible crime spree. I . . . really don't see to [sic] ma[n]y sprees. And the crime spree involves really violent crime. Robbery is a violent crime. Doesn't mean somebody was hurt. I consider it a violent crime. I think Indiana considers it a violent crime, whether it's a pellet gun unloaded or not, if those were the facts, it doesn't matter. And then you . . . also commit a Burglary in Green [County] and during this spree you commit two Burglaries in Lawrence County and you also commit an[] attempted robbery and Conspiracy to commit Burglary in Monroe County. I mean, that's . . . a serious crime spree. And I always take[] a dim view, and the law takes a dim view of Burglary and I sure as heck take a dim view of Robbery cases.

Tr. p. 46-47. Magness acknowledged that he had an opportunity to review the presentence reports in all of the cases and indicated that no factual additions, deletions, or corrections were required. The reports indicated that prior to sentencing, Magness pleaded guilty to several other charges in at least two different counties. Those convictions stemmed from events that occurred in April and May 2004.

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[4] Ind. Code § 35-43-2-1.

The trial court sentenced Magness to 547 days of incarceration on the marijuana count with 182 days suspended. That sentence was ordered to run consecutively to a sentence that was imposed in Monroe County on an unrelated charge. Magness was also sentenced to five years for robbery, and to concurrent six-year sentences on each class C burglary. The trial court ordered the sentences for robbery and burglary to be served consecutively to each other, consecutively to the sentence for marijuana possession, and consecutively to the Monroe County sentence.[5] Magness now appeals.

DISCUSSION AND DECISION

I. Blakely Violation

Magness contends that his sentence must be set aside because the trial court improperly identified his alleged crime spree as an aggravating factor. In particular, Magness argues that imposing a sentence greater than the statutory fixed term for burglary and robbery violates the rule announced in Blakely because that aggravating circumstance was not found by a jury.

Before addressing the merits of Magness's argument, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code

[5] We cannot determine the precise aggregate sentence that was ordered in this case because the record is not clear as to the sentence that was ordered in the Monroe County case. However, if we do not consider the time that Magness received on the Monroe County charge, the aggregate sentence on the instant charges totals twelve years.

§§ 35-50-2-3 to -7. The statutes were amended to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code § 35-38-1-7.1, § 35-50-2-1.3.

Here, Magness committed his criminal offenses before this statute took effect but was sentenced after the effective date. Until recently, there has been a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

However, in Gutermuth v. State, No. 10S01-0608-CR-306, slip op. at 5 n.4 (Ind. June 20, 2007), our Supreme Court observed that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime." Because Magness committed the offenses prior to the effective date of the sentencing amendments, we apply the former version of the statute.[6] As a result, the trial court's actions herein implicate Blakely

[6] When Magness committed the offenses, Indiana Code section 35-50-2-7(a) provided:

"A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances. In addition, he may be fined not more than ten

concerns.

In accordance with Blakely, juries, and not judges, must find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." Blakely, 542 U.S. at 301. However, our Supreme Court has observed that "Blakely and the later case United States v. Booker[, 543 U.S. 220, (2005),] indicate that there are at least four ways that meet the procedural requirements of the Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005). Specifically, in addition to a jury finding, a prior conviction, an admission by a defendant, and a defendant's consent to judicial fact-finding are proper ways to enhance a sentence under Blakely. Johnson v. State, 830 N.E.2d 895, 897 (Ind. 2005).

In this case, Magness admitted to committing at least four felonies in seven days. Tr. p. 14-17. Even though Magness did not specifically state that he had been engaged in a "crime spree," he admitted the essential facts that led to the enhanced sentence. Id. And our Supreme Court has determined that the frequency and number of offenses is an appropriate aggravating circumstance. See Henson v. State, 707 N.E.2d 792, 795-96 (Ind. 1999) (recognizing that a five-year sentencing enhancement was supported by, among other things, the fact that the defendant was engaged in a "crime spree"). In this instance, therefore, the

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thousand dollars ($10,000)." Additionally, Indiana Code section 35-50-2-6 provided that "A person who commits a class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars ($10,000)."

trial court's identification of Magness's multiple crimes as an aggravator did not run afoul of Blakely.

II. Improper Aggravating Circumstance

In a related issue, Magness argues that he must be re-sentenced because the trial court erred in stating that the fact that he had committed "crimes of violence" was an aggravating circumstance. Appellant's Br. p. 12. In essence, Magness contends that this was an improper aggravator because labeling the crimes as "serious" and "violent" was tantamount to improperly identifying an element of the offense as an aggravating factor. Id. at 14.

While Magness correctly observes that a trial court may not use a material element of the crime as an aggravating factor, it may consider the particularized nature and circumstances of the offense. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). Although the trial court in this case was certainly impressed that Magness's offenses were crimes of violence, it is a distortion to suggest that the trial court enhanced the sentences simply because of the serious nature of the crimes. Rather, the trial court simply considered the nature and circumstances of the offenses, and noted the breadth of Magness's activity, which involved the commission of at least seven felonies in three counties in approximately thirty days. Indeed, the trial court stated "I . . . really don't see to [sic] ma[n]y sprees." Tr. p. 46. In our view, it is apparent that the sentences were enhanced in light of the scope and flurry of Magness's criminal behavior. See Haas v. State, 849 N.E.2d 550, 555 (Ind. 2006) (holding that enhancement of sentence for conspiracy to commit burglary was proper when the trial court considered the heinousness of the offense and the "type of planning" in which the

defendant and his confederates engaged). Moreover, as set forth above, Magness admitted to the commission of these offenses.

Finally, even assuming for argument's sake that this was an improper aggravating factor, it has been determined that a single aggravating factor may support the imposition of both an enhanced and consecutive sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004). Because we have determined that the trial court properly identified Magness's crime spree as an aggravating circumstance, his claim fails.

III. Consecutive and Enhanced Sentences

Magness contends that the trial court was without authority to impose enhanced sentences and also order them to be served consecutively to one another. In particular, Magness argues that Indiana's new sentencing scheme only empowers a trial court to impose a consecutive sentence if it imposes the advisory sentence for that crime. Moreover, Magness claims that the "ameliorative nature of the amendments to Indiana Code section 35-50-2-1.3 [applies] to those who, like Magness, committed an offense before the statute was in effect but were sentenced thereafter." Appellant's Br. p. 4.

In resolving this issue, we note that Indiana Code section 35-50-2-1.3(c) provides, in relevant part, as follows:

> In imposing consecutive sentences in accordance with I.C. 35-50-1-2 . . . a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Magness's argument highlights a split of authority on our court. In analyzing the amended sentencing statutes, different panels of this court have reached different conclusions

regarding the interaction between Indiana Code sections 35-50-1-2(c) and -1.3(c). In White v. State, we found that trial courts are authorized to impose enhanced, consecutive sentences:

> Indiana Code § 35-50-2-1.3 instructs: "In imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]" We conclude that when the General Assembly wrote "appropriate advisory sentence," it was referring to the total penalty for "an episode of criminal conduct," which, except for crimes of violence, is not to exceed "the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." See Ind. Code § 35-50-1-2(c). In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the "appropriate advisory sentence" for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose consecutive sentences.

849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied.

In Robertson v. State, a separate panel rejected the White analysis and, instead, held that "the advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and imposes a separate and distinct limitation on a trial court's ability to deviate from the advisory sentence for any sentence running consecutively." 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), trans. granted. The Robertson court expressed concern about the result in White:

> Our concern with the analysis in White is that (1) it renders the language in IC 35-50-2-1.3 surplusage since the consecutive sentencing statute, IC 35-50-1-2, clearly limits the total of the consecutive sentences for non-violent offenses to the advisory sentence for the next highest class of felony; and (2) nothing in the advisory sentencing statute, IC 35-50-2-1.3, limits its application to non-violent offenses. Although the White decision argues that the legislature could not have intended the results the statute is capable of generating, the argument

> is moot "[w]hen the language of the statute is clear and unambiguous." 849 N.E.2d at 742-43.

Id. at 624-25 (citation omitted).[7] Ultimately, the Robertson court remanded the case to the trial court with instructions that it reduce the enhanced, consecutive sentence to the advisory sentence.

A different panel of our court denounced the Robertson analysis and, instead, applied the White analysis. Barber v. State, 863 N.E.2d 1199, 1210 (Ind. Ct. App. 2007). Specifically, the Barber court found that the amended sentencing statutes do not limit a trial court's authority to impose enhanced, consecutive sentences:

> Indiana Code § 35-50-2-1.3 serves another very important purpose. In the wake of Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), our legislature transformed Indiana's sentencing scheme from a presumptive scheme to an advisory scheme. Under the former presumptive scheme, a trial court was required to impose the "presumptive" sentence for a felony conviction unless the court found aggravating circumstances to enhance the sentence or mitigating circumstances to reduce the sentence. Under the new advisory scheme, trial courts are generally not required to use an advisory sentence. See I.C. § 35-50-2-1.3 ("Except as provided in subsection (c), a court is not required to use an advisory sentence."). Because an advisory sentence is in most cases exactly that—advisory—the legislature included subsection (c) of Indiana Code § 35-50-2-1.3 to remind Indiana's trial courts of those statutory provisions that do require the "use" of an advisory sentence[, in relevant part,] in imposing consecutive sentences in accordance with Indiana Code § 35-50-1-2 . . . . We acknowledge that nothing in Indiana Code § 35-50-2-1.3(c) limits its application to any specific subsections of Indiana Code §§ 35-50-1-2, 35- 50-2-8, and 35-50-2-14, but each of those statutes only includes one subsection that refers to advisory sentences.

Id. at 1211 (emphases in original).

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[7] We cite to Robertson for the purpose of demonstrating the various interpretations of the statutes.

Even more recently in Geiger v. State, 866 N.E.2d 830, 840 (Ind. Ct. App. 2007), yet another panel declared: "we are persuaded that the better analysis is that set forth in White and Barber." In particular, we observed that

> When we read Indiana Code section 35-50-2-1.3 in conjunction with section 35-50-1-2, it is apparent that the reference to the "appropriate advisory sentence" was meant to apply to situations involving the single episode of criminal conduct limitation on consecutive sentencing. This statute was not intended to place any other limits on a court's ability to impose consecutive sentences. Contrary to the conclusion of the Robertson court, we do not believe that this interpretation renders the statutory language to be surplusage; rather, it provides clarification regarding what advisory sentence is to be used when the single episode of criminal conduct limitation is applicable. We also note that a troubling consequence of the Robertson analysis would be that trial courts would be prohibited from imposing enhanced, consecutive sentences on the worst offenders. That cannot have been the intent of our legislature. Consequently, we find that the trial court herein had the authority to impose enhanced, consecutive sentences, and did not err by doing so.

Id. at 840-41. For these same reasons, we find that the trial court herein properly exercised its discretion in imposing enhanced, consecutive sentences on Magness.[8]

IV. Appropriateness

Finally, Magness argues that his sentence was inappropriate when considering the nature of the offenses and his character. Specifically, Magness contends that his sentence should be revised because he pleaded guilty to the offenses, accepted responsibility for his

[8] As an aside, we note that our legislature recently amended Indiana Code section 35-50-2-1.3, effective July 1, 2007. Specifically, subsection (d) was added to the statute, which now provides that "this section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct."

actions, and was "done with drugs." Appellant's Br. p. 18-19.[9]

Our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Indiana Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

With regard to the nature of the offenses, the evidence shows that Magness pleaded guilty to four felonies, each of which was committed within thirty days of the others, and that his crimes involved three different victims. It was also established that Magness had been previously convicted in other counties of multiple felonies that he committed around the same period of time. Appellant's Br. p. 8-9; Appellant's App. p. 120-22, 125. In our view, the sheer number of offenses that Magness committed within a short period of time warranted considerably more than a presumptive, concurrent sentence for each offense. In short, Magness's "nature of the offense" argument does not aid his inappropriateness argument.

Turning to his character, Magness emphasizes that he "demonstrated remorse by pleading guilty." Appellant's App. p. 99, 111, 121. Magness also testified at his sentencing

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[9] Magness limits his challenge to the sentence under Indiana Appellate Rule 7(B). He does not challenge the propriety of the trial court's sentencing statement or make a claim that the trial court's balancing of aggravating and mitigating circumstances was improper.

hearing that he took "complete responsibility" for his crimes. Tr. p. 35. However, Magness is not a first-time offender. He has a criminal history, and the offenses here appeared to have been motivated or prompted in no small measure by drug abuse. Despite these run-ins with the law, Magness has not been deterred from criminal conduct. Moreover, the multitude of criminal activity in which Magness engaged over a short period of time establishes a clear disregard for the law. Even though Magness might be "far from the worst" offender that this court has seen, Magness has also received far from the worst punishment that could have been meted out. Indeed, the trial court might have been justified in ordering maximum consecutive sentences totaling more than twenty-four years for these offenses. After analyzing the nature of the offenses and Magness's character, we do not find Magness's sentence inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.